Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of	)	
	)	
Implementation of the Local	)	CC Docket No. 96-98
Competition Provisions in the	)	
Telecommunications Act of 1996	)	

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JOINT REPLY COMMENTS OF SPRINT SPECTRUM AND AMERICAN PERSONAL COMMUNICATIONS

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SUMMARY

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The Commission correctly recognizes in its *Notice* the "pro-competitive, deregulatory context of the 1996 [Telecommunications] Act as a whole" and proposes national rules and forward-looking pricing standards that will promote local telephone competition. However, the Commission also must recognize, and give effect to, the pro-competitive, deregulatory context of the 1993 Budget Act, which established a clear, unambiguous federal policy granting CMRS providers access to LEC networks and shielded them from burdensome regulations. The key question for CMRS providers raised in this proceeding is how will the Commission read the 1996 Telecommunications Act in light of the 1993 Budget Act.

First, Sprint Spectrum and APC urge the Commission to follow the clear direction of Congress and exclude CMRS providers from the definition of a "local exchange carrier." This conclusion stems from a straight-forward reading of the statutory text of the 1996 Act, as well as from the clear policy judgment reflected in the 1993 Act that the Commission generally should forbear from imposing new burdensome regulations on CMRS providers. *Second*, the Commission should look to the 1996 Act for guidance in selecting a pricing standard for CMRS-LEC interconnection. The Commission posed the question of interconnection rates in the *CMRS Notice*, and now Congress has indicated how termination and transport rates should be set for co-carriers: at incremental costs. This pricing standard, set forth in Section 252(d)(2), means that a LEC cannot include any overhead or shared costs in its forward-looking, incremental rates. *Third*, the Commission should adopt bill and keep as an appropriate proxy for reciprocal incremental costs, and it at least should be an interim policy for CMRS-LEC interconnection. Bill and keep is easy to administer, can be adopted

readily, and the LECs' own data demonstrates that the cost of transport and termination is near zero.

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In adopting the Telecommunications Act of 1996 (the "1996 Act"), Congress intended to end telecommunications monopolies in the United States and replace them with even-handed and spirited competition. In adopting the Omnibus Budget Reconciliation Act of 1993 (the "1993 Act"), Congress established a clear, unambiguous federal policy in favor of nationwide policies under which commercial mobile radio service ("CMRS") providers would flourish and, one day, supply much-needed competition to monopoly markets. The task before the Commission is to write rules in this proceeding, and in the parallel proceeding on CMRS-LEC interconnection, that are consistent with "the pro-competitive, deregulatory context of the 1996 Act as a whole,"[1/] *and* consistent with the pro-competitive, deregulatory context of the 1993 Act as well.

Certain commenters in this docket display a staggering disrespect for the goals Congress stated explicitly in the 1996 and 1993 Acts. These commenters — not surprisingly,

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1/ Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket 96-98 (the "*Notice*") at ¶ 3.

incumbent local exchange carriers ("LECs") — now insist that Congress really intended that pricing for termination and transport of traffic carry with it the vestiges of past monopoly regulation into the new millennium and beyond. Certain other commenters — certain state regulators and some LECs — argue that, despite Congress' clear emphasis on *federal* goals and standards, Congress really meant for states to take the lead. In addition, these commenters urge the Commission to use the 1996 Act as a vehicle for imposing burdensome regulatory obligations on CMRS providers. These views cannot be reconciled with the text and purpose of the 1996 and 1993 Acts. Congress did not intend for the Commission to perpetuate monopoly pricing levels in setting its standards, nor did Congress intend for competition to be delayed and denied while new competitors battle with incumbent LECs in 50 state public utility commissions across the country.

Sprint Spectrum and American Personal Communications[2/] urge the Commission to remain true to the explicit text and intent of the 1993 Act *and* the 1996 Act in establishing classifying CMRS providers and setting pricing standards for the termination and transport of traffic by co-carriers. The Commission must give full effect to the nationwide CMRS policies explicit in the 1993 Act. This means the Commission must establish specific

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[2/] Sprint Spectrum L.P. ("Sprint Spectrum") is a joint venture formed by subsidiaries of Sprint Corporation, Tele-Communications, Inc., Comcast Corporation, and Cox Communications, Inc. American PCS, L.P. d/b/a American Personal Communications ("APC") is a limited partnership in which American Personal Communications, Inc. is the sole managing general partner and 51 percent equity holder and Sprint Spectrum is the 49 percent limited partner. APC provides PCS service under the name "Sprint Spectrum."

national interconnection policies for CMRS providers.[3/] This policy should have three fundamental elements: *First*, the Commission should establish an immediate interim policy of bill and keep for CMRS-LEC interconnection. *Second*, the Commission should properly interpret the 1996 Act as directing the Commission to establish a policy of requiring transport and termination of traffic to be based solely on the incremental, forward-looking costs of providing interconnection — without permitting incumbent LECs to perpetuate the economic effects of their past monopolies by recovering embedded, non-competitive costs. *Third*, the Commission should find that bill and keep is an appropriate proxy for a system of reciprocal compensation based on incremental costs. We urge the Commission not to be swayed from its moorings by comments that seemingly ignore the 1993 Act and reflect not the text of the 1996 Act nor the will of Congress but an attempt to forestall, rather than promote, competition.

I. CMRS PROVIDERS ARE NOT "LECS" UNDER THE 1996 ACT.

The 1996 Act defines the term "local exchange carrier" with the specificity appropriate for such an important definition. Section 3(26) of the Communications Act, as amended, defines "local exchange carrier" as "any person that is engaged in the provision of telephone exchange service or exchange access" but explicitly provides that:

[3/] We will not repeat here the arguments from our initial comments or our comments in the Commission's parallel proceeding concerning LEC-CMRS interconnection. *See* Comments of Sprint Spectrum & APC, Interconnection Between Local Exchange Carriers and Commercial Mobile Service Providers, CC Docket 95-185 (the "*CMRS Notice*"). We incorporate by reference here our comments in that proceeding.

> Such term does not include a person insofar as such person is engaged in the provision of a commercial mobile service under section 332(c), except to the extent that the Commission finds that such service should be included in the definition of such term.

Congress clearly intended for the potential inclusion of CMRS carriers in the definition of LEC to be a narrowly focused inquiry. A CMRS provider may be included in the definition of a LEC only to the extent that the Commission finds that "future circumstances warrant" such inclusion.[4/]

Before a CMRS provider may be classified as a "LEC," then, there must be a specific finding that "*future* circumstances," such as a particular CMRS provider providing LEC-replacement service to a "substantial portion" of the population within a state, warrant inclusion in the "LEC" definition. This language does not, as Pacific Telesis argues, permit the Commission to simply find presumptively that all CMRS providers should be LECs regardless of whether they provide LEC-replacement service to a substantial portion of the population of a state.[5/] The definition crafted by Congress explicitly demands a fact-specific determination about "*future* circumstances" rather than an across-the-board presumption adopted today.

Neither does the Commission's proposed distinction improperly distinguish between carriers.[6/] In fact, it is a distinction that is plain on the face of the statute; to the extent that

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[4/] Telecommunications Act of 1996, Conference Report, Report 104-458 at 116 (Jan. 31, 1996).

[5/] Comments of Pacific Telesis at 81.

[6/] *See* Comments of Texas Office of Public Utility Counsel at 40; Comments of USTA at (continued...)

commenters disagree with the plain language of the statute, their complaint should be with Congress rather than with the Commission. As we demonstrated in our initial comments, the 1996 Act draws distinctions among carriers based on innumerable differences in service — the areas to which certain carriers bring service (the rural telephone company provisions of Sections 251(f)(1) and 253(f)); carriers' size, market power, and previous ownership (the provisions distinguishing LECs from "incumbent LECs" in Section 251); whether carriers possess economies of scale or scope (the "qualifying carrier" provisions for infrastructure sharing in Section 259), and even the particular services they provide (the health-care provisions of § 254(h)).[7]

Generally excluding CMRS providers from the definition of "LEC," as Congress plainly did, makes eminent sense for two reasons. For one, CMRS providers have obligations and responsibilities under Section 332(c), which Congress recently adopted to establish the regulatory framework for the wireless industry. Second, the 1993 Act and the 1996 Act both reflect the judgment that as markets become competitive, regulations should be reduced. The forbearance authority in Section 332(c), which is nearly identical to the forbearance authority in Section 401 of the 1996 Act, directs the Commission to reduce

[6](...continued)
67; Comments of BellSouth at 64; Comments of Pacific Telesis at 81; Comments of National Association of Regulatory Utility Commissioners at 21.

[7] *See* Sprint Spectrum/APC Comments at 4-5 n.7.

regulations as markets become more competitive.[8] Because of the burgeoning competition in the CMRS marketplace, a proposal to impose new burdensome regulations on CMRS providers is directly contrary to the thrust of the 1993 and 1996 Acts. In fact, it is precisely backward to presume that all CMRS providers are LECs. Congress has properly struck the balance in its definition, and the arguments of those who would urge the Commission to reconsider Congress' judgment should be rejected.

II. THE 1996 ACT INDICATES THAT TRANSPORT AND TERMINATION CHARGES MUST BE BASED ON INCREMENTAL COSTS WITHOUT THE INCLUSION OF OVERHEAD, COMMON OR SHARED COSTS.

In the *CMRS Notice*, which was initiated prior to passage of the 1996 Act, the Commission asked what the appropriate pricing standard should be for transport and termination between LECs and CMRS providers.[9] Since the *CMRS Notice* was released, Congress has supplied guidance on the question of pricing standards: Section 252(d)(2) states that co-carriers seeking termination and transport of traffic shall pay rates based solely on a LEC's incremental, forward-looking costs. Accordingly, we urge the Commission to

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[8] Compare Section 332(c)(1)(A) ("[T]he Commission may specify by regulation as inapplicable to that service [any regulation] . . . [if] enforcement of such provision is not necessary in order to ensure that the charges . . . are just and reasonable . . . .") with Section 401 of the 1996 Act, codified at Section 10 of the Communications Act ("*Notwithstanding section 332(c)(1)(A) of this Act*, the Commission shall forbear from applying any regulation or any provision of this Act . . . if the Commission determines that enforcement of such regulation or provision is not necessary to ensure that the charges . . . are just and reasonable . . . .") (emphasis supplied) (punctuation omitted).

[9] *Notice* at ¶ 76.

follow the guidance of Congress and establish termination and transport charges based exclusively on incremental costs.

As we set out in our initial comments, the text and structure of the 1996 Act make it clear that the cost of transport and termination of traffic, as provided for under Section 252(d)(2) of the 1996, shall be based exclusively on these costs and shall not include any overhead, joint and common, or shared costs. It is worth noting that the only carriers that can avail themselves of transport and termination under the Section 252(d)(2) standard, as a matter of statutory interpretation and logic, are carriers that can *originate* traffic.[10/] Only carriers that can originate and terminate traffic with an end user — that is, co-carriers — can seek transport and termination from the incumbent LEC consistent with Section 252(d)(2). It would be entirely inappropriate to force a co-carrier competitor to bear the burden of embedded monopoly costs, as both the 1996 Act and the Commission's *Notice* recognize explicitly.

However, the United States Telephone Association ("USTA"), Bell Atlantic, Ameritech, and BellSouth all argue that the Commission should allow LECs to recover the total costs of their network.[11/] Such "total costs," they contend, must reflect unrecovered embedded costs of incumbent networks as well as joint and common costs. U S West and

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[10/] This intent is made specific in Section 252(d)(2)(A)(i), which clearly establishes a requirement of mutual functionality: each co-carrier must be capable of "terminat[ing] . . . calls that originate on the network facilities of the other carrier . . . ."

[11/] *See* Comments of USTA at 39-40; Comments of Bell Atlantic at 35-40; Comments of Ameritech at 78; Comments of BellSouth at 49, 51-53.

GTE Corp., similarly, contend that failure to permit recovery of these total costs will lead to inefficient investment and consumption incentives.[12] These commenters claim that setting rates below "total" costs will deter LECs from undertaking investments to improve the network because of the supposed risk that costs will not be recovered. On the demand side, these same commenters claim that recovery of only incremental costs will cause new entrants to both over-consume interconnection and under-invest in their own facilities.

The chief problem with these arguments is that they are based on the carriers' views of policy and economics and avoid the very text of the 1996 Act. In fact, Congress weighed these LECs' views and rejected them. Having lost before Congress, these LECs now ask the Commission to ignore the text and intent of the 1996 Act and instead to perpetuate monopoly-level pricing in the United States. We urge the Commission to decline the invitation.

If Congress wanted LECs to force their competitors to shoulder their embedded costs, then why did Congress provide explicitly that termination and transport rates must be based exclusively on "*a reasonable approximation of the additional costs of terminating*" the call? Instead, Congress unmistakably intended this pricing standard for termination to reflect solely the additional incremental costs of the particular call being carried. And why would the statutory language on pricing standards for interconnection (§ 252(d)(1)) *expressly exclude* consideration of rate-based proceedings, which is the forum where the debate on allocation

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[12] *See* Comments of GTE Service Corporation at 61-63; Comments of U S West at 27-28.

of embedded or historical costs has occurred? Rates for transport and termination of traffic cannot permissibly include any amounts greater than the actual, incremental cost of carrying the particular call in question. As outlined in our initial comments, this conclusion is supported by the text of the 1996 Act, its intent and history, and well-established principles of telephone competition.

In short, the LECs' policy and economic arguments would be unavailing even if the explicit text of the 1996 Act allowed for their consideration. Co-carriers, such as CMRS providers, will not "under-invest" in their own infrastructure merely because of the opportunity to transport and terminate traffic on a cost-neutral basis because the marketplace will not allow it. These networks must have, as APC does today, the functionality and ubiquity necessary to effectively challenge existing LEC networks in order to win the confidence and trust of consumers. It also can be presumed that the same state public utility commissions that commented extensively in this very proceeding would not permit incumbent LECs to avoid investing in their own networks merely because they cannot force their competitors to share the costs of building, maintaining and expanding their own networks. Besides, the very fact of competition should provide LECs with ample incentive to invest in their own network. Finally, it would be nonsensical for the Commission to adopt the LEC position: why should new competitors, which are forging ahead with their own extensive infrastructure construction and expansion, be required to bear, in substantial part, the historic costs of the monopolies with which they are competing? The intricate system set up by Congress in structuring Sections 252(d)(3), 252(d)(1) and 252(d)(2) for carriers with different levels of infrastructure demonstrates conclusively that Congress knew precisely what it intended when it set an incremental-cost standard for Section 252(d)(2).[13/]

Economic reality, not regulatory decisions, should guide the market. A forward-looking cost structure that recognizes different levels of requesting-carrier investment is essential to ensuring accurate market signals are sent concerning actual economic cost of services to consumers and new entrants.[14/] Competitive markets render embedded, sunk or stranded costs moot. Section 252(d)(2) is clear and explicit: No joint and common costs or overhead loadings shall be included in the rate for transport and termination. The sole basis for transport and termination rates is "a reasonable approximation of the additional costs of terminating such calls." § 252(d)(2)(A)(ii). The explicit designs of Congress should end speculation on the appropriate standard and the LECs' arguments should be rejected.

III. BILL AND KEEP IS AN APPROPRIATE PROXY FOR RECIPROCAL INCREMENTAL COSTS AND SHOULD BE AT LEAST AN INTERIM POLICY FOR CMRS-LEC INTERCONNECTION.

The Commission should establish nationwide rules to govern CMRS-LEC interconnection under Section 332 of the Act and should be guided in establishing the pricing standard under Section 332 by its determination of appropriate pricing under Section 252(d)(2). This action alone would permit CMRS providers to have the consistent, pro-competitive federal policy required by Section 332 while allowing them to be treated

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[13/] *See* Sprint Spectrum/APC Comments at 6-8.

[14/] *See Notice* at ¶ 124.

identically to other competitive carriers requesting transport and termination of traffic under Section 251. Because CMRS providers are building out nationwide systems and beginning to offer service to the public now, however, Sprint Spectrum and APC urged the Commission in our initial comments to find that bill and keep was an appropriate proxy for a policy of reciprocal incremental-cost transport and termination or, at least, to find that bill and keep is an effective interim policy for CMRS-LEC interconnection.

LEC commenters, consistent with the positions they took in opposing bill and keep in responding to the *CMRS Notice*, argue that bill and keep cannot be ordered by the Commission under the 1996 Act. Rather, they claim, bill and keep is only available if negotiating parties agree upon this arrangement through the voluntary waiver of their mutual recovery rights under section 252(d)(2)(B)(i). For example, GTE Corp. argues mandating bill and keep would deprive parties of their fundamental rights under the 1996 Act to negotiate their own agreement. U S West, Ameritech and Bell Atlantic simply replay their arguments from their *CMRS Notice* comments in which they claim that bill and keep effects a Fifth Amendment taking and is economically wasteful.

These arguments are simply wrong, both as a matter of statutory interpretation and communications policy. We have responded fully to these claims in our *CMRS Notice* reply comments and will not repeat those arguments in detail here.[15] It should be noted, however, that the same LECs that now claim that bill and keep is so one-sided as to be

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[15] *See* Joint Reply Comments of Sprint Spectrum and American Personal Communications, *In the Matter of* Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers, (CC Docket 95-185 March 26, 1996) at 13-16, 20-27.

unconstitutional (a baseless claim) did not supply one whit of data on their own costs to the Commission in the *CMRS Notice* proceeding, despite the Commission's plea that they supply detailed cost information. The sole parties to submit cost information were new competitors, which established that the cost of transport and termination of traffic is near zero. The Brock analysis, which was based on the LECs' own data and which was not rebutted by the LECs, demonstrates that the average cost of traffic is only $0.002 per minute.[16] APC's own experience, moreover, demonstrates that CMRS providers — particularly PCS providers — have the potential to achieve traffic balance with LECs. Accordingly, bill and

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[16] *See* G.W. Brock, *Incremental Cost of Local Usage*, (CC Docket 94-54, March 16, 1995).

keep is a fair and appropriate proxy for a policy of mutual, reciprocal trade of traffic between CMRS providers and LECs.

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Respectfully submitted,

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